LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
AUG 23 1957
JOHN T. FEY, Clerk

No. 400

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

SINCLAIR PIPE LINE COMPANY, *Petitioner*,

v.

ARCHER COUNTY, TEXAS, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Howard Barker
1500 Sinclair Building
Fort Worth 2, Texas
Counsel for Petitioner

Fort Worth Brief Printing Co., 610 S. Jennings Street, Phone ED 2-6070

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2–4
CONSTITUTIONAL PROVISIONS INVOLVED	4
STATEMENT	4–11
REASONS FOR GRANTING THE WRIT	11–18
A. Importance of Question	11–13
B. Direct conflict with an applicable holding of this Court and failure to apply the substantive law of the State of Texas	13–16
C. Conflict with decision of another Court of Appeals	16–18
CONCLUSION	19
APPENDIX A. Opinion Below	20–25
B. Judgment Below	26
C. Article 6674n, Revised Civil Statutes of Texas	27–29
D. Opinion of the Attorney General, State of Texas, No. 0-2405-A	30–32
E. Constitution of the State of Texas, Article 1, Section 17	33

CITATIONS

Cases: *Page*

Buckeye Pipe Line Co. vs. Edward M. Keating, et al, 229 F. 2d 795 (1956) 12, 16

Erie R. Co. vs. Tompkins, 304 U.S. 64 16

McCandless vs. Furland, 296 U.S. 140 16

W. L. Moody Cotton Co. vs. Commissioners Court of Montague County, 261 S.W. 2d 204 (1953) 14

Panhandle Eastern Pipe Line Co. vs. State Highway Commission of Kansas, 294 U.S. 613 ..... 10, 13, 14, 16

Traders Compress Co. vs. State, 77 S.W. 2d 245 (1934) 5, 14, 15

Upshaw vs. United States, 335 U.S. 410 16

Statutes and Constitutional Provisions:

Constitution of the United Staets— Fifth and Fourteenth Amendments 4

Constitution of the State of Texas— Article 1, Section 17 (Appendix E) 4

Federal-Aid Highway Act of 1956, 70 Stat. 374 ..... 11, 13, 19

Federal Rules of Civil Procedure, Rules 17a, 19b 10

Revised Civil Statutes of Texas, Article 6674n (Appendix C) 9, 14, 15

Article 6022 8

28 U. S. C., Section 1254(1) 2

Vernon's 1957 Texas Session Law Service, Fifty-fifth Legislature, Regular Session, Chapter 301, Section 1, Page 731 12

Miscellaneous:

Opinion of the Attorney General, State of Texas, No. 012405-A, (Appendix D) 14

No. .....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

SINCLAIR PIPE LINE COMPANY, *Petitioner,*

v.

ARCHER COUNTY, TEXAS, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Sinclair Pipe Line Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause on May 29, 1957.

I.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Texas (R. 35) is reported in 147 F. Supp. 650. The opinion of the United States

Court of Appeals for the Fifth Circuit (Appendix A, infra, page 20) is not yet reported.

II.

JURISDICTION

The decision and judgment of the Court of Appeals was entered on May 29, 1957 (Appendix B, p. 25, infra). No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

III.

QUESTIONS PRESENTED

1. Where a County, having elected and agreed with the State to furnish, by purchase or condemnation, all necessary highway right-of-way free of cost to the State, thereafter undertakes to acquire all right-of-way for such highway but refuses to conden or pay Petitioner for the admitted reasonable and necessary cost of adjusting its pipe lines to the widened highway improvement, Petitioner cannot be classed as a volunteer (and thus denied its just compensation) in thereafter adjusting its lines to the highway improvement when the County, in undertaking to acquire the necessary right-of-way, thus subjected Petitioner to the coercive effect of State Highway Regulations requiring pipe lines to be lowered, encased and vented and when the County was charged in law with notice of such Regulations and the specifications for the highway improvements.

2. A County which has elected and agreed with the State to acquire and furnish all necessary right-of-way for a highway improvement program free of cost to the State cannot thereafter deny Petitioner the admitted reasonable and necessary cost of making adjustments to its pipe line so as to accommodate the pipe line to the highway improvement on the claim that Petitioner was a volunteer and that such right-of-way was not "required" by the State, when Petitioner would have been violating State Highway Regulations had such adjustments not been made by it following the refusal of the County to purchase or condemn.

3. Whether an interstate pipe line company which incurred the admittedly necessary and reasonable expense of lowering and encasing its existing lines in order to: (1) accommodate a program of highway improvement; (2) comply with State Highway Department Regulations, and (3) avoid the public dangers that would have existed without these alterations can be classed as a volunteer and thus denied its just compensation simply because the State Highway Commission failed to request its right-of-way agent (Archer County, which had agreed to furnish all necessary right-of-way to the State free of cost to the State) to obtain a release of damages or a right-of-way deed and because Petitioner, upon learning that its lines were being exposed by construction operations and that immediate action was necessary, proceeded with the necessary alterations and called on the County for compensation rather than suing for an injunction to

hold up the highway improvement until it was paid or promised its reimbursement?

IV.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are in the Fifth and Fourteenth Amendments to the Constitution of the United States, and Article 1, Section 17 of the Constitution of the State of Texas:[1]

V.

STATEMENT

A. The Holdings Below:

Although erroneously holding that Petitioner was a volunteer (and, therefore, not entitled to its otherwise just compensation), the Courts below wholly failed to give due consideration or even casual reference to the undisputed fact that the very act of the County in agreeing and undertaking to furnish all necessary right-of-way to the State, free of cost to the State, *subjected* Petitioner to the impact and compelling effect of State Highway Regulations (R. 57, 58), themselves making mandatory the identical alterations ultimately made by Petitioner after demand upon and refusal by the condemning authority (Archer County) to purchase or condemn.

Likewise, although holding that Petitioner was entitled to just compensation, but not from Archer County, the Courts below wholly failed to recognize

[1]Pertinent portions of Article 1, Section 17 of the Constitution of the State of Texas are printed as Appendix E, p. 82, infra.

the pertinent Texas law as clearly announced in *Traders Compress vs. State*, 77 S. W. 2d 245, 247 (1934), that a judgment "against the state which is unauthorized by law does not constitute adequate compensation."[2] It follows, therefore, that if Archer County is not liable to Petitioner and since a judgment against the State is *not* adequate compensation, Petitioner has, *in fact*, been denied its constitutional guarantees.

B. The Facts

Petitioner, Sinclair Pipe Line Company, sued Archer County, Texas, Respondent, in the United States District Court for the Northern District of Texas to obtain compensation for its expense in lowering and encasing its pipe lines made necessary by highway improvements, in the nature of widening and relocating roads in Archer County. Sinclair also sought declaratory relief establishing its right to compensation for future costs of the same kind in the event proposed highway improvements are made necessitating other adjustments in its pipe lines.

Jurisdiction of the District Court was invoked because of diversity of citizenship. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00 (R. 21).

Sinclair operates various pipe lines as an interstate common carrier for the transportation of oil and other hydrocarbons and derivatives. Its pipe lines for years have been located in Archer County.

[2]To the same effect, see Opinion of the Attorney General, State of Texas, (Appendix D, p. 29, infra).

When improvements are made on highways in Texas, it is the established practice that the *County furnish title, free of cost to the State,* to the necessary land or right-of-way. *Once* the County has agreed to furnish such land and right-of-way, the State *then* assumes the cost of thereafter improving and maintaining the highways (R. 84-86).

The Commissioners Court (the governing body of Archer County, Texas), by orders dated February 9, 1953, and November 9, 1953, agreed on behalf of the County[2] to furnish free of cost to the State of Texas, all right-of-way made necessary by the proposed highway improvements (R. 21-26).

It was admitted that the highway improvements *necessitated* the moving, extension, lowering and, in some instances, the encasing of Petitioner's existing pipe lines at seven separate highway crossings in Archer County (R. 27-29).

The laws and regulations of the State of Texas, as well as the protection of the underlying pipe lines and the traveling public, require that the pipe lines be located at a certain depth below the surface and that the lines be encased in a larger pipe for the full width of the right-of-way with a vent at each end (R. 57, 58, 67-70; Exhibit 9). This is undisputed in the Record — *but* neither opinion below makes mention of *this* fact.

Respondent also admitted that the pipe line alterations made by Sinclair were necessary and were made at a reasonable cost (R. 27-29).

---

[2]This agreement was made pursuant to statutory authority granted by Article 6674n, Revised Civil Statutes of Texas (Appendix C, p. 26, infra).

The pipe lines, long before the highway improvement, were buried under and within easements, title to which Petitioner had for years held by right-of-way deeds and/or prescription (R. 27, 28).

Petitioner made futile demand upon Archer County both before and after the highway improvements were initiated, for the payment of the reasonable and necessary cost of adjusting and relocating its pipe lines (R. 74, 75, 76-79), within the *widened* or *relocated* right-of-way which Respondent had agreed to furnish to the State, free of cost to the State.

Prior to construction of the highway improvements, Sinclair wrote County Judge D. M. Harris on October 4, 1954, following up Petitioner's letter dated September 23, 1954, requesting payment or reimbursement for Sinclair's estimated cost of adjusting its pipe lines to the highway improvements (R. 76-77). Thereafter, Sinclair's superintendent of right-of-way was advised by the County Attorney of Archer County, under date of June 14, 1955 (R. 78-79), that ". . . it would be bad policy, regardless of legal liability, to voluntarily pay your company the amounts claimed by it. In the event the County is liable for the work already done and for the work contemplated, after such liability is established, the Court will make payment. * * * Of course the County has easements from the abutting land owners and it appears that work will begin under authority of such easements."[4]

It is apparent from the County Attorney's letter

[4]The last quoted sentence clearly evidences the intention of the County to completely disregard Petitioner's rights in its underground pipe line easement.

of June 14, 1955, that the acquisition of right-of-way and construction of the highway was going forward without the County having given Petitioner a definite answer to its request for payment.

So situated, Sinclair deemed that the hazard necessarily existing in exposing or coming in close proximity to its lines (in the course of the proposed highway improvements) made the lowering and encasing of its lines imperative (R. 77, 80). Petitioner then did the work itself, the County having refused to pay — after a long delay in responding to Sinclair's repeated demands (R. 76-77).

Thereafter, this suit was instituted to recover the admitted reasonable and necessary cost of such adjustment.

Article 6022, Revised Civil Statutes of Texas, gives pipe line companies the right to go *under and across existing highways.*[5] *None of the expense now claimed by Petitioner represents adjustment to segments of its pipe line laying within the old right-of-way, but represents only adjustment to portions formerly existing in privately owned easements which were appropriated and embraced within the new or wider highway right-of-way.*

Apparently, it is the contention of Respondent that simply because it was not furnished by the State Highway Commission a *form* of release or right-of-way deed to be obtained from Petitioner, that, therefore, the County is not obligated to condemn or pay

[5]This right is not disputed and in the interest of brevity Article 6022, supra, is not set forth as an Appendix.

Petitioner for an admitted interference with its private easement. Article 6674n, Revised Civil Statutes of Texas, does not condition the acquisition of right-of-way upon such a nebulous and gratuitous ministerial aid in furnishing the *necessary* (in law) right-of-way free of cost to the State. The County Judge of Archer County finally acknowledged on cross-examination that neither the State Highway Commission nor the Texas Highway Department entered into negotiations for right-of-way,* but that this was left up to the County and that the County had on previous occasions relocated or moved fences or power poles off the newly acquired right-of-way *at no cost* to the land owner or power company and *without being furnished a release or right-of-way deed by the State Highway Commission* (R. 84-86).

---

*"Q. *Judge, the Texas Highway Department does not enter into negotiations for right of way, do they?*

A. *No, it's up to the County. The County agrees in order to get that.*

Q. Any right of way that is necessary to be furnished has to be paid for and furnished by the County?

A. Any right of way?

Q. Yes.

A. Yes, we pay . . .

• • •

Q. *Any right of way that is furnished is actually paid for by the County out of County funds?*

A. *Any right of way, you say?*

Q. *Yes, sir.*

A. *I assume it is. I don't know of any of them requiring any other way (acquiring any other way).*

Q. If a farmer has to move his fence back, you take care of that, don't you?

A. We usually make a deal with the farmer, the rancher, to build him a fence.

Q. Or move his fence?

A. Usually build him a fence and move, use his old wire. Yeah, we will say move it but it's usually a new fence built.

Q. Now, does the State Highway Department furnish you any forms

The District Court, without a jury, held the County not liable to Sinclair. Although the Court recognized that the highway improvements required "prudent readjustment" of the pipe lines (R. 39), it erroneously held that the County was not responsible because it did not condemn the right-of-way and Sinclair failed to sue to restrain the work (R. 40), and since the State agency did not call on Archer County to condemn the right-of-way or to seek a release of damages (R. 41), the County had no obligation to Sinclair (R. 42). Indeed, the District Judge said that the County "need not necessarily even contact" Sinclair in furnishing the required right-of-way (R. 42). Its easement was said *not* to be an interest in land that needed to be condemned (R. 42).[1] The Court said this was simply a claim for damages and not a taking of property without just compensation (R. 44-45).

---

of easement or deed or anything for that fencing, fence moving?

A. Now, that's the deal that we make with the farmer. We go out there and trade with him and we tell him that we'll put him up a good 4-wire fence for the land that we are taking. In some instances, why, there is damage done and we pay him the damage.

Q. *Have you ever had an occasion where telephone poles or power poles were on the right of way and had to be moved?*

A. *I believe there has been some.*

Q. *And did you pay the cost of relocating those?*

A. *Yes, I believe we did, if I recall correctly. It hasn't been very much of that, if any.*

Q. *Did the State Highway Commission or the State of Texas furnish you any sort of right of way deed or instrument to accomplish that?*

A. *No, sir, they did not.*"

(Emphasis added) (R. 84-86)

[1] This holding is in direct conflict with the holding of this Court in *Panhandle Eastern Pipe Line Co. vs. State Highway Commission of Kansas*, 294 U.S. 613, where this Court stated at page 618: "A private right-of-way is an easement and is land." see p. 13, infra.

The Court of Appeals affirmed, approving the District Court's reasoning, and erroneously held that Sinclair could not recover its necessary expenses because the State Highway Commission had not requested or required Archer County to: (1) purchase or condemn Sinclair's right-of-way, or (2) to remove, relocate and encase the pipe line, and because Sinclair acquiesced in and had failed to bring suit to prevent the road contractor from proceeding with the construction before Sinclair had a promise of reimbursement.

VI.

REASONS FOR GRANTING THE WRIT

Importance Of The Question:

1. Clearly, the questions presented here are of vital importance both to the protection of property rights and to the modernization of the Nation's highway system, in that numerous similar instances of a necessary relocation of local and interstate pipe lines (or other structures) will arise in the future as a result of the expanding highway improvement program, not only in the State of Texas, but in the Nation as a whole by reason of the Federal-Aid Highway Act of 1956, Public Law 627, Chapter 462, Eighty-Fourth Congress, Second Session, which makes provision for the availability of Federal Funds for establishing a National System of Interstate and Defense Highways, including Federal Aid for Primary and Secondary Highway System. The Legislature of the State of Texas has, effective August 1, 1957, enacted enabling

legislation authorizing and directing Cities and Counties to acquire right-of-way necessary for the National System of Interstate and Defense Highways in accordance with the *same* statutory procedure as involved in this case. Vernon's 1957 Texas Session Law Service, Fifty-Fifth Legislature, Regular Session, Chapter 301, Section 1, page 731.

Indeed, the Seventh Circuit in *Buckeye Pipe Line Co. vs. Keating*, 229 F. 2d 795 (1956), cert. den., Oct. 1956, 352 U. S. 830, judicially noted in its opening statement at page 796, that this type of controversy is one "often occurring throughout the United States."

What is involved here is not limited to pipe line rights-of-way easements, but is likely to arise where *any* easement is crossed or subjected to interference, whether water line, underground conduit, existing street or structure, sewer or telephone, telegraph or power transmission lines.

The decision of the Court of Appeals below, for the Circuit in which a great number of important interstate oil and natural gas pipe lines originate, will require a mass of expensive and prolonged litigation, tying up and delaying the Nation's highway building program. The pipe line companies, and others similarly situated, cannot safely proceed with the orderly readjustment of their lines, or other structures, to accommodate the expanding highway program, *for if they do, they are classed as volunteers and cannot obtain* their *just compensation for* the *necessary* and reasonable *expense involved.*

The decision below will require the pipe lines, and others so situated, to wage a constant battle by injunction in every case to obtain their just compensation. They cannot take the prudent business course and adjust their lines or structures as may be required by existing law or regulations or when danger impends, yet it is self-evident that the expanded highway program will require the adjustment of all such facilities.

With so enormous a program as that contemplated by the 1956 Federal-Aid Highway Act getting under way, this Court should review this urgent problem of nationwide significance, both in terms of the probable delaying effects of the decision below on the highway improvement plan and the impact it will have in bringing needless litigation before the lower Federal Courts.

Direct Conflict with an Applicable Holding of This Court and Failure to Apply the Substantive Law of the State of Texas:

2. The decision of the Court below is in direct conflict with the applicable decision of this Court in *Panhandle Eastern Pipe Line Co. vs. State Highway Commission of Kansas*, 294 U. S. 613.

In the Panhandle Eastern case, the Kansas Highway Commission, without any proceeding in condemnation, ordered the Company to make specific changes in its transmission lines. It refused. The Commission obtained a writ of mandamus directing compliance. As in this case, permission of the owners of the fee

to use the necessary land had been obtained, but the pipe line company was ordered to make material changes in its lines without compensation.

This Court held that to enforce the Commission's order would deprive the Company of property without due process, in violation of the Fourteenth Amendment.

Here, all parties admitted that adjustments and changes made by Sinclair were necessary and proper and that the cost was reasonable. *The changes were likewise required by State Regulations.* The pipe line company therefore did the work, reserving the right to and later requesting the payment for such cost (R. 77).

The holding of the District Court below that Sinclair's easement was not such an interest in land as required condemnation (R. 42) is in direct conflict with the holding of this Court in the Panhandle Eastern case that: "*A private right of way is* an *easement and* is *land.*" 294 U. S. 613, 618. (Emphasis added)

The Courts below were under the mistaken impression that Sinclair could seek its just compensation from some source other than Archer County. This clearly is not so under Texas law. *Traders Compress Co. vs. State*, 77 S. W. 2d 245 (1934); *W. L. Moody Cotton Co. vs. Commissioner's Court of Montague County*, 261 S. W. 2d 204 (1953); *Opinion of the Attorney General, State of Texas*, No. 0-2405-A, Appendix D, infra, p. 29; Article 6674n, Revised Civil Statutes of Texas, Appendix C, infra, p. 26.

Neither the *State* of Texas *nor* the *State Highway Commission undertook to obtain any* of the right-of-way or land involved in this highway improvement project. *All* of the land and right-of-way, as provided by Article 6674n, Revised Civil Statutes of Texas, (R. 36, Appendix C, p. 26, infra) was to be paid for out of County Funds. Under the applicable Texas authority, *Traders Compress Co. vs. State*, 77 S. W. 2d 245 (1934), *once* a county undertakes to acquire by purchase or condemnation right-of-way for highway improvement purposes, the County Funds are the only funds available to compensate for the taking of land or right-of-way. *No recovery can be had from the State.*

Although Archer County was authorized by statute to and did agree and undertake to purchase or condemn the necessary land and right-of-way, it refused to make any compensation for the necessary cost of adjusting Sinclair's lines within the widened or relocated highway. Can it be seriously contended that the County was to purchase or condemn *all* of the *other* land or right-of-way necessary in the improvement program, but that as to Petitioner, its easement rights were to be purchased or condemned by some authority *other* than Archer County?

As we view this decision: In the Panhandle Eastern case, the pipe line company was *ordered* by the *condemning authority* (the Kansas Highway Commission) without condemnation proceedings, to make the admittedly necessary adjustments at its own expense.

In the instant case, the *condemning authority* (Archer County) *ignored* the Constitutional *rights* of *Petitioner and refused an affirmative demand of Petioner to reimburse* it *for* the *cost of* making the *admittedly necessary adjustments.* Petitioner then did what it was required to do to conform to State Highway Department Regulations, and now seeks just compensation!

Since the decision of the Court below is in direct conflict with *Panhandle Eastern Pipe Line Co. vs. State Highway Commission*, supra, and fails to apply the substantive of the State of Texas, a typical situation is presented in which this Honorable Court has, on prior occasions, granted writs of certiorari. *McCandless vs. Furland*, 296 U.S. 140; *Upshaw vs. U.S.*, 335 U.S. 410; *Erie R. Co. vs. Tompkins*, 304 U.S. 64.

Conflict With Decision of Another Court of Appeals:

3. The decision of the Court below is likewise in conflict with the applicable decision of the Court of Appeals, Seventh Circuit, in *Buckeye Pipe Line Co. vs. Keating, et al*, 229 F. 2d 795 (1956), cert. den., Oct. 1956, 352 U.S. 830. Buckeye brought suit against Keating (the subdivider of the land involved), The Mercantile National Bank of Hammond, Indiana (the trustee of the subdivision), and the Town of Highland, praying that its title in its pipe line easement be quieted and defendants be permanently enjoined from building any structures that would interfere with the pipeline or its accessibility for maintenance purposes.

The Court held that Buckeye's easement was superior to any later acquired interest and that defendants would have to adapt their use of the land to the rights of Buckeye, and, consequently, enjoined defendants from paving streets over the pipe line and required them to take the necessary steps to prevent traffic from crossing over the pipe lines. The decree further provided that the injunction would be dissolved when the pipe line was encased and lowered or when defendants paid Buckeye the cost of lowering and encasing.

The Seventh Circuit did recognize the applicability of the Panhandle Eastern case and correctly held at 229 F. 2d 795, 798:

> "The owner of the fee may use the property through which the easement runs in any manner he desires, *but he may not interfere with the plaintiff's enjoyment of its existing rights in the pipe line.* Panhandle Eastern Pipe Line Co. v. State Highway Commission, 294 U.S. 613, 55 S. Ct. 563, 79 L. Ed 1090. An easement is an interest in real property. It is expressed not in terms of possession or occupancy but in terms of use . . .
>
> "*In the Panhandle case, supra, the Kansas Highway Commission tried, under authority of a Kansas statute, to force the pipe line company to remove or lower its pipeline at its own expense. The Supreme Court held that this was a taking of property without due process of law.*" (Emphasis added.)

In the Buckeye case the pipe line *company sought to enforce its rights by injunction*, while *here Peti-*

tioner, after *being refused* compensation *by* the *condemning authority* (Archer County), made the admittedly necessary adjustments at its own expense after reserving its right to demand payment when the cost was determined (R. 77), *and now seeks its remedy at law rather than in equity.*

CONCLUSION

Once it is recognized that Petitioner cannot secure relief from the State for the cost of adjusting its pipe lines to this highway improvement because Respondent has become the real party in interest (Rules 17a, 19b, Federal Rules of Civil Procedure) and has agreed with the State to furnish the necessary right-of-way free of cost to the State, it becomes apparent that, unless reimbursement is had from the County, Sinclair has no possible route of recovery.

Further, the conflict between an applicable decision of this Court and an applicable decision of the Seventh Circuit, together with the impact which the carrying out of the 1956 Federal-Aid Highway Act will have upon property rights similarly situated, makes it of vital national significance and importance that this problem be now clarified and set at rest for the benefit of the many interests and Federal Courts which will, of necessity, be affected by the national highway construction program.

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

Howard Barker

Howard Barker
1500 Sinclair Building
Fort Worth 2, Texas
Counsel for Peitioner

August 22, 1957

APPENDIX A

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 16454

Sinclair Pipe Line Company,
Appellant,

versus

Archer County, Texas,
Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(May 29, 1957.)

Before HUTCHESON, Chief Judge, and TUTTLE and JONES, Circuit Judges.

HUTCHESON, Chief Judge: Alleging that, as the reasonable and necessary cost of accomodating or adjusting its existing pipe lines to widened or relocated rights of way, for which defendant had undertaken with the Highway Commission to acquire the necessary clearances, it had made expenditures, for which it had not been reimbursed, plaintiff brought this suit for a declaratory judgment, that it was entitled to recover them as compensation for property taken without due process of law.

The defendant denying liability, the cause was tried to the court without jury, and the district judge,

setting out and discussing in an exhaustive and well reasoned opinion[1] the controlling statutes, the applicable authorities, and the undisputed facts, and giving his reasons for so doing, concluded that the defendant was not answerable to plaintiff, and entered judgment denying the relief sought.

Appealing from the judgment, appellant, taking no issue with the court's findings of fact, indeed stating, "The matter at issue is primarily one of law, most of the facts being undisputed", but attacking under extended specifications of error the conclusions of the district judge, is here insisting that, upon basic principles, the expenditures made necessary to adjust appellant's pipe lines to the highways constituted a taking within the protection of the Constitutional guarantees, federal and state, and that under its place in the statutory scheme[2] for the acquisition of land

[1]Sinclair Pipe Line Co. v. Archer County, 147 F. Supp. 650.

[2]Title 116, Art. 6674N, R.C.S. provides in part:

"Whenever, in the judgment of the State Highway Commission, the the use or acquisition of any land for road, right of way purposes • • • is necessary or convenient to any road to be constructed, reconstructed, maintained, widened, straightened or lengthened, • • • the same may be acquired by purchase or condemnation by the County Commissioners Court, • • • Provided that the County in which the State Highway is is located may pay for same out of the County Road and Bridge Fund, or any available county funds.

"Any Commissioners Court is hereby authorized to secure by purchase or by condemnation on behalf of the State of Texas, any new or wider right of way • • • to be used in the construction, reconstruction, or maintenance of State Highways and to pay for the same out of the County Road and Bridge Fund, or out of any special road funds or any availale county funds. • • • The State Highway Commission shall be charged with the duty of furnishing to the County Commissioners Court the plats or field notes of such right of way • • • after which the Commissioners Court may, and is hereby authorized to purchase or condemn the same, with title to the State of Texas, in accordance with such field notes. • • • Provided that if the County Commissioners Court of any

for the State Highway Commission for road rights of way, the county, upon the undisputed facts as found by the court, became in fact and in law obligated to the defendant to reimburse it for its enforced outlays.

In support of this view, it urges upon us that, though Article 6674Q-4, Vernon's Civil Statutes, gives the State Highway Commission the exclusive and direct control of all improvements to the State Highway system and Article 6673 provides that the counties through which said highways pass "shall be free from any cost, expense, or supervision of such highways", Art. 6674N makes it clear that it was not intended to relieve counties from the costs and expenses incidental to acquiring rights of way. In further support, it cites *Traders Compress v. State*, 77 SW(2) 245, in which the court, while stating that Section 6674N authorizes the Commissioners Court to condemn land for the use and benefit of the State Highway Commission, goes on to say:

> "This statute does not impose on the Commissioners Court the duty of securing land for the purpose therein specified but does require that if the authority granted be exercised, the Commissioners Court pay for the land purchased or pay the damages for the land condemned 'out of the County road and bridge fund or out of any

County in which such right of way is, in the judgment of the State Highway Commission, necessary for the construction of a part of a designated State Highway shall fail or refuse to secure by purchase or by condemnation for or on behalf of the State of Texas, such right of way, or part thereof, immediately and as speedily as possible, * * * said State Highway Commission shall direct the Attorney General of Texas, to institute condemnation proceedings in the name of the State of Texas, for the purpose of securing such right of way."

> specific road funds that may be provided by law.'"

and to the same effect, *W. L. Moody Cotton Co. v. Commissioners Court*, 261 SW(2) 204. Finally, it cites and firmly relies on *Panhandle Eastern v. State Highway Commission*, 294 U.S. 614, Petition of Dreosch, 47 NW(2) 106, and *Buckeye Pipe Line v. Keeting*, 229 F(2) 795, as holding that "an easement is an interest in real property"; and that, when a pipe line company owning pipe line easements is required in connection with a road improvement program to lower and/or reincase its pipe lines, its property, the easement, is taken from it "not necessarily when the adverse party occupies the land but only when he prevents or interferes with the owner's use of the easement. When that occurs, there has been a taking of property from the owner of the easement just as much as if the adverse party had real estate which another owned in fee." *Buckeye v. Keeting*, *supra*, at p. 798.

Appellee, not at all disputing the force and effect of the cases cited by appellant, insists that the appellant, in undertaking to analogize the situation here to those existing in the cases it relies on, has wholly failed to take into account the great, the fundamental differences in the facts. So insisting, it points out that the record shows without dispute: that Archer County did not take any action to condemn the pipe lines or to require that they be removed, relocated, or reincased; that it neither widened the roads not in any other manner interfered with plaintiff's pipe lines;

that it did not request anything, take anything, or assist in taking anything from defendant; that it agreed with the Highway Commission only to furnish rights of way requested or required of it by the Commission; that no request was made of it in connection with plaintiff's pipe lines; and that appellant does not take into consideration that when the Commission, through an independent contractor, widened the highway and interfered, or was about to interfere, with such pipe lines, Sinclair, without taking any action to prevent the contractor from proceeding with the work or to obtain or secure a promise to pay therefor, acquiesced therein and altered its existing lines not only without any promise of reimbursement but with the knowledge that the county did not and would not recognize any liability.

Upon these considerations, which appellee insists show no basis for the liability of the county, either statutory or contract, appellee urges upon us that the district judge was right in holding that Archer County was not liable.

Finally, pointing out that it is not at all insisting that the Highway Department or the State is not, or might not be, liable to the appellant, *City of Wichita Falls v. Real Estate Trust*, 135 SW(2) 736, but is only insisting that the district judge was right in holding that the County neither took nor destroyed, nor in any way interfered with or affected plaintiff's easement, and, therefore, was not liable to plaintiff, appellee argues that appellant's position comes at last to this, *that merely because the county had the right*

to condemn the right of way or to otherwise procure or compel the adjustments made by Sinclair to the highway uses, it must be held that, though it did not exercise such right, it must pay Sinclair for having gone to expense which the county neither required nor requested that it incur.

Upon careful consideration of the facts as the district judge sets them forth and the law as he correctly reasons it out, we conclude that the appellee has the right of it and that the judgment must be affirmed.

As the district judge pointed out, the statute authorizing counties to obtain and pay for rights of way, while giving them the right, did not impose the duty, to do so. Further, while the County did agree with the Commission to furnish rights of way requested of it, no request was made of the County with respect to plaintiff's pipe lines and plaintiff does not and cannot claim as a third party beneficiary under the contract between the Commission and the County.

While appellant does point to the minutes of the Commissioners Court, in which it agreed to furnish rights of way required, it is unable to point to any requirement or request by the Highway Commission that the County obtain a right of way or a clearance or acquittance in respect to the plaintiff's pipe lines. Indeed, the record shows that no such request was made by the Highway Department and that prior to incurring the expenses plaintiff requested the County to pay for them, and it refused.

The judgment was right. It is AFFIRMED.

APPENDIX B

JUDGMENT.

Extract from the Minutes of May 29, 1957.

No. 16454

SINCLAIR PIPE LINE COMPANY,

versus

ARCHER COUNTY, TEXAS

This cause came on to be heard on the transcript of the record from the Northern District of Texas, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Sinclair Pipe Line Company, and the surety on the appeal bond herein, Federal Insurance Company, be condemned, in solido, to pay the cost of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX C

"ART. 6674n. CONDEMNATION OF RIGHT OF WAY AND MATERIALS BY COMMISSIONERS' COURT

"*Whenever, in the judgment of the State Highway Commission, the use or acquisition of any land for road, right of way purposes, timber, earth, stone, gravel or other material is necessary or convenient to any road to be constructed, reconstructed, maintained, widened, straightened or lengthened,* or land not exceeding one hundred (100) feet in width for stream bed diversion in connection with the locating, relocating or construction of a designated State Highway by the State Highway Commission, *the same may be acquired by purchase or condemnation by the County Commissioners Court. This authority includes the power to exercise the right of eminent domain by any County Commissioners Court within the boundaries of a municipality with the prior consent of the governing body of such municipality.* Provided that the county in which the State highway is located *may pay for same out of the County Road and Bridge Fund, or any available county funds.*

"*Any Commissioners Court is hereby authorized to secure by purchase or by condemnation on behalf of the State of Texas, any new or wider right of way or land not exceeding one hundred (100) feet in width* for stream bed diversion in connection with the locating, relocating or construction of a designated State Highway, or land or lands for material or borrow pits, to be used in the construction, reconstruction or main-

tenance of State Highways and to pay for the same out of the County Road and Bridge Fund, or out of any special road funds or any available county funds. This authority includes the power to exercise the right of eminent domain by any County Commissioners Court within the boundaries of a municipality with the prior consent of the governing body of such municipality. The State Highway Commission shall be charged with the duty of furnishing to the County Commissioners Court the plats or field notes of such right of way or land and the description of such materials as may be required, *after which the Commissioners Court may, and is hereby authorized to purchase or condemn the same*, with title to the State of Texas, in accordance with such field notes. Provided that in the event of condemnation by the County the procedure shall be the same as that set out in Title 52, Articles 3264 to 3271, inclusive, Revised Civil Statutes of Texas, of 1925. Provided that if the County Commissioners Court of any County in which such right of way is, in the judgment of the State Highway Commission, necessary for the construction of a part of a designated State Highway shall fail or refuse to secure by purchase or by condemnation for or on behalf of the State of Texas, such right of way or part thereof, immediately and as speedily as possible, under said Title 52, Articles 3264 to 3271, inclusive, Revised Civil Statutes of Texas, of 1925, after being served with a copy of an order of the State Highway Commission identifying by field notes, the part of the Highway necessary for the construction of such designated State Highway and requesting such County

Commissioners Court to secure same, then and in such event and within ten (10) days after the service of such notice, said State Highway Commission shall direct the Attorney General of Texas, to institute condemnation proceedings in the name of the State of Texas, for the purpose of securing such right of way. Such condemnation proceedings shall be instituted by the County or District Attorney of the County in which the land is situated and the venue of such proceedings shall be in the county in which the land is situated and jurisdiction and authority to appoint three (3) disinterested freeholders of such county as Commissioners is hereby conferred upon the County Judge of such County in which the land is situated and otherwise such condemnation shall be according to the provisions of said Title 52, Articles 3264 to 3271, inclusive, Revised Civil Statutes of Texas, 1925, as amended. As amended Acts 1955, 54th Leg., p. 1128, ch. 423, Sec. 1."
(Emphasis added.)

APPENDIX D

THE STATE OF TEXAS
OFFICE OF THE ATTORNEY GENERAL
OF TEXAS
AUSTIN

Gerald C. Mann
Attorney General

This Opinion Overrules Opinion No. 0-2405

Honorable Fred Norris
County Auditor
Polk County
Livingston, Texas

Opinion No. 0-2405-A
Reconsideration of Opinion No. 0-2405
Re: Highways—Pipe Lines.

In your original request for an opinion of this Department upon the matters therein discussed you attached a copy of a franchise that Polk County granted to the Shell Pipe Line Corporation in 1931. Pursuant thereto, the Shell Pipe Line Corporation laid pipe lines and erected telephone lines under, above, across, etc. the public roads of Polk County. Then in 1938 Polk County was called upon by the State Highway Department to secure right-of-way for various highway constructions, most of which was newly located along the old highways, consequently, the Shell Pipe Line Corporation was called upon to lower its pipe line in several places and to case the pipes at these new locations. Some of these new locations were only a few yards from the old locations, but the above mentioned work was necessary.

About December, 1928, said corporation presented Polk County with an account representing the cost necessitated by the above mentioned work. The commissioners' court passed an order that the same be paid, but the auditor refused to sign the warrant, and to date the corporation has not received any compensation, but now demands that the account be paid. The present commissioners' court at a recent meeting rescinded the former order of said court passed by their predecessors ordering that the account be paid. Under the above mentioned facts your original inquiry presented the following question:

> "Please advise, as to your opinion, as to whether Polk County owes Shell Pipe Line Corporation anything or not."

And in answer to the above in our original Opinion No. 0-2405, it was held, in effect that the commissioners' court of Polk County had no authority to pay the claim.

Under the facts stated in the original request it was assumed that the above mentioned corporation was constructing and running its pipe lines under existing public roads. However, under the actual facts presented to this Department the said corporation had right-of-way deeds for all the pipe line laid in Polk County and the new highways crossed the right-of-way of the said corporation at several different places, due to the construction of the new highways, the corporation was forced to lower and case its lines in compliance with the State regulations and law, and at no point along the pipe line did the new highway use the old highway right-of-way.

It is a fundamental principal of law that private property shall not be taken for public use without adequate compensation, and that no person shall be deprived of his property except by due course of law. Therefore, we are of the opinion that where the state has permitted such corporation as above mentioned to erect and construct its lines under and across public roads, *and where the county requires the additional right-of-way for new highways or public roads over and across the private property of the above mentioned corporation, the county would be liable to said corporation for the expense of casing said lines and burying them at a proper depth.* We think that our Opinion No. 0-2274, and the authorities cited therein, is applicable to the question here under consideration and enclose a copy of the same for your convenience. Our original Opinion No. 0-2405 is hereby withdrawn.

Trusting that the foregoing fully answers your inquiry, we are

Yours very truly
Attorney General of Texas
s/ Ardell Williams
Ardell Williams, Assistant

AW:BBB
APPROVED OCT. 9, 1940
/s/ Gerald C. Mann
ATTORNEY GENERAL OF TEXAS
APPROVED
OPINION COMMITTEE
By s/ BWB
Chairman
(Emphasis added)

APPENDIX E

Constitution of the State of Texas, Article 1, Sec. 17

"TAKING, DAMAGING OR DESTROYING PROPERTY FOR PUBLIC USE; SPECIAL PRIVILEGES AND IMMUNITIES; CONTROL OF PRIVILEGES AND FRANCHISES

"Sec. 17. No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof."